No. 15992

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOE BRUNO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

I.

STATEMENT OF JURISDICTION.

The Government accepts the Statement of Jurisdiction as presented by the appellant.

II.

STATEMENT OF THE CASE.

A. Factual Statement.

On October 10, 1957 appellant's co-defendant, Cellino, was contacted by Los Angeles County Deputy Sheriff Ray Velasquez, acting as an undercover agent, through one Bobby Ulrey [R. T. 35]. Ulrey said he would like to "pick up," *i.e.*, obtain some heroin [R. T. 35]. Co-defendant Cellino said "he did not have any stuff but he would take us to the man that did" [R. T. 35, lines 12-

13]. These three individuals then drove to Narva and Mission Streets in Los Angeles at Cellino's direction where the latter told the others to wait, and left them [R. T. 35]. Two or three minutes later appellant Bruno came to the car where Velasquez and Ulrey were waiting and said, "How much do you guys want to pick up?" [R. T. 35]. Velasquez said that he wanted an ounce of heroin and immediately the appellant and Velasquez negotiated the price of the sale [R. T. 36-37]. Furtive arrangements were then made for delivery of the narcotics [R. T. 37]. Arrangements were also made for a further transaction between appellant and Velasquez [R. T. 37-38]. A conversation ensued between them regarding how much the particular narcotics could be cut (diluted) and regarding their quality [R. T. 39]. Velasquez paid appellant $100 in federal advance funds, and further machinations followed resulting in the first delivery of narcotics by appellant to Velasquez [R. T. 40-42, Ex. 1].

On October 14, 1957 a second purchase was made by Velasquez from appellant [R. T. 44-46]. Again appellant advised Velasquez as to how to cut the narcotics [R. T. 45-46]. Although the price quoted by appellant for this transaction was $400 [R. T. 44], appellant agreed to modify it to $380 upon negotiation [R. T. 45]. Again appellant personally delivered the narcotics to Velasquez and received the $380 of federal advance funds [R. T. 46, Ex. 2].

On October 23, 1957 Velasquez again met appellant [R. T. 49]. Appellant suggested that the site of negotiations was "too hot" and that he and Velasquez should go elsewhere [R. T. 49]. The negotiations were carried out and another transaction for heroin was consummated [R. T. 50-52, Ex. 3]. Again appellant advised Velasquez

regarding "cutting" of the narcotics [R. T. 51]. On the same occasion appellant indicated that he was always ready to deal in heroin [R. T. 53, lines 16-17].

On November 24, 1957 Velasquez and appellant entered into their fourth dope transaction [R. T. 55-59, Ex. 4]. The transaction was concluded in a secretive manner [R. T. 55-59].

The jury convicted appellant Bruno on all four transactions [C. T. 53].

B. Procedural Statement.

The Indictment charged in each of four counts that appellant sold and facilitated the sale of a quantity of heroin on different dates [C. T. 2-3].

Local Civil Rule 14(a) of the United States District Court for the Southern District of California, incorporated in the Federal Criminal Rules for that District by Rule 1 of the District's Rules of Criminal Procedure, provides:

> "Rule 14. Instructions to Jury.
>
> "(a) Requests for Instructions and Objections Thereto:
>
> "If the case is a jury trial, proposed instructions in writing for the jury, together with citations of authority for each instruction, shall be presented to the court in duplicate as soon as possible after the opening of the trial, but the court in its discretion may at any time prior to the opening of argument to the jury receive additional such requests. Each separate request shall be numbered, shall indicate which party presents it, and shall embrace but one subject and the principle of law embraced in any requested instruction shall not be repeated in subsequent requests.

> "Copies of requested instructions shall be served forthwith upon the adverse party. The adverse party shall, within such time as the court may allow, specify objections in writing (or orally if permitted by the court) to any of said instructions. Such objections shall be numbered and shall specify distinctly the matter to which said adverse party objects, and said objections shall be accompanied by citations of authority in support thereof."

Appellant failed to present his proposed jury instructions on the opening day of trial, February 18, 1958, as required by the foregoing rule. They were filed on the afternoon of February 19, 1958 [C. T. 16].

Appellant's motion for acquittal at the end of the Government's case was denied [R. T. 138, 151; C. T. 16]. Such motion was not renewed at the end of all the evidence [R. T. 194; C. T. 16-17].

On February 20, 1958 the court, out of the presence of the jury, read its proposed instruction on entrapment and asked appellant whether he desired such instruction to be given. The appellant said "no" [C. T. 51; R. T. 196-199].

The only objection made by appellant to the instruction as given was the refusal by the court to give appellant's proposed Instruction No. 3, bearing on his contention that he was only an agent and therefore not criminally responsible in the transaction [R. T. 216; C. T. 51].

The court's instructions [R. T. 202-215; C. T. 31-50] covered, among other matters, the elements of the offense

[R. T. 212], the inferences that the statute expressly provides with reference to the importation of narcotics and appellant's knowledge thereof [R. T. 213-214], and the manner by which appellant could overcome such inferences [R. T. 213].

III.
SUMMARY OF ARGUMENT.

A. *The evidence did not establish the principal-agent relationship contended for by appellant.*

1. There were sufficient facts to establish a buyer-seller relationship between appellant and undercover Agent Velasquez, but not a principal-agent relationship.

2. Assuming, *arguendo*, that appellant was selling for another, he facilitated the sale of heroin, and the conviction must be sustained on that ground.

3. Appellant's proposed Instruction No. 3 [C. T. 29] was properly refused since it (a) was not filed within the time required by the court rules, and (b) because it does not represent the law in this Circuit.

B. *The statutory presumption is valid and was properly presented with the other facts to the jury for its ultimate determination.*

C. *An undercover agent may properly afford one engaged in the narcotics traffic (as here) the opportunity to commit a felony. The defense of entrapment is unavailable in such circumstance.*

IV.
ARGUMENT.

A. The Evidence Did Not Establish the Principal-Agent Relationship Contended for by Appellant.

1. There were sufficient facts to establish a buyer-seller relationship between appellant and undercover Agent Velasquez, but not a principal-agent relationship.

2. Assuming, *arguendo,* that appellant was selling for another, he facilitated the sale of heroin, and the conviction must be sustained on that ground.

3. Appellant's proposed Instruction No. 3 [C. T. 29] was properly refused since it (a) was not filed within the time required by the court rules, and (b) because it does not represent the law in this Circuit.

A reading of the evidence, particularly the portions highlighted in appellee's Statement of the Case, should be sufficient to establish appellant as the seller of narcotics to Velasquez. Appellant made all the price negotiations, personally made the deliveries, and personally accepted the federal advance funds which were paid to consummate each transaction. Appellant indicated his participation in and knowledge of dope traffic by discussing with Velasquez how to "cut" the heroin appellant was selling. He knew the quality of his product. Furthermore, the furtive and secret arrangements which were made in connection with the sales are evidence that the appellant was not acting as an innocent agent.

It may be true that appellant obtained his narcotics from another. This fact, if true, does not necessarily negate the existence of a seller-buyer relationship or

established an agency. Appellant did not testify, which is his privilege, but would have us assume that he was a mere conduit without offering any evidence to that effect. A search of the record indicates the absence of such evidence. It is common knowledge that narcotics generally changes hands several times before it reaches the ultimate consumer. Taking the evidence at its face value, there is no other rational conclusion on the facts of this case except that appellant was acting as a seller.

Appellant's argument, based on the conjunctive nature of Indictment, indicates his misunderstanding of federal criminal pleading (App. Br. p. 10).

Where a statute specifies several ways or means in which an offense may be committed in the alternative, it is bad pleading to allege such means in the alternative, the proper way being to connect the various allegations in the indictment with the conjunctive term "and" and not with the word "or."

Crain v. United States, 162 U. S. 625, 636;

Fredrick v. United States, 163 F. 2d 536, 544 (9 Cir., 1947), cert. den. 332 U. S. 775;

Price v. United States, 150 F. 2d 283 (5 Cir. 1945), cert. den. 326 U. S. 789;

Mellor v. United States, 160 F. 2d 757, 761 (8 Cir., 1947);

District of Columbia v. Hunt, 163 F. 2d 833 (D. C. Cir., 1947);

Heflin v. United States, 223 F. 2d 371, 373 (5 Cir., 1955).

In the *Mellor* case, *supra*, the following language appears at page 671:

> ". . . if the statute denounces several things as a crime, the different things thus enumerated in the statute being connected by the disjunctive 'or,' the pleader *must* connect them by the conjunctive 'and' before evidence can be admitted as to more than one act. To recite that the defendant did the one thing 'or' another makes the indictment bad for uncertainty. To charge the one thing 'and' another does not render the indictment bad for duplicity and a conviction follows if the testimony shows the defendant to be guilty of either the one *or* the other thing charged."

Proof of any one of the acts joined in an indictment in the conjunctive is sufficient to support a verdict of guilty where the statute groups several related offenses in the disjunctive.

Crain v. United States, supra;

Fredrick v. United States, supra;

Price v. United States, supra;

Mellor v. United States, supra;

Heflin v. United States, supra.

It is the statute which determines what is the crime. Thus, the instant conviction can be maintained if it is sustainable either as a sale or as a facilitation of a sale (Title 21, U. S. C., §174). Assuming, *arguendo,* that appellant was acting on behalf of another, he nevertheless facilitated the sale. The facts are not capable of the construction that Velasquez wanted appellant to go out to some other person acting as a mere conduit, and purchase heroin from him.

The appellant's requested Instruction No. 3 [C. T. 29] would have served to confuse the jury unnecessarily since it was not based upon any evidence in the case.

The cases cited by appellant in support of his proffered instruction do not help him. *United States v. Sawyer,* 210 F. 2d 169 (3 Cir., 1954), is far different factually as indicated by the following quotation from page 170:

> "There was evidence that defendant and a companion were walking along a Wilmington street at about 5:30 p. m. on their way home from the plant where they both were employed. They passed a parked automobile in which a stranger sat talking to an acquaintance of theirs who was standing on the sidewalk. The stranger called Sawyer over to the car and asked 'Can you get me some horse,' the word 'horse' being a slang expression for heroin. Sawyer remonstrated that he had a job and was not doing that sort of thing. The stranger repeated his request urging that he was 'sick.' But Sawyer and his companion left him and continued on their way. After they had walked a short distance the same two men intercepted them again. This time the stranger feigned a dramatic and violent seizure and begged Sawyer to get him something to relieve his distress. Sawyer, moved by this apparent suffering and knowing where heroin could be purchased, took twenty dollars as then proffered, went to a nearby hotel, purchased some heroin for twenty dollars and brought it back and gave it to the stranger. . . ."

None of these factual elements is present in the instant case as indicated by the fact statements in this and in appellant's brief.

In *Adams v. United States,* 220 F. 2d 297 (5 Cir., 1955), also relied on by the appellant, there is no indica-

tion that the indictment charged facilitation. The defendant there was charged with a sale, but she testified in her own behalf, and this testimony, together with all of the other facts, was consistent with the conclusion that she acted as a procuring agent, not as a seller. On the facts of that case it is clear that defendant did facilitate a sale, and unquestionably a conviction on such charge would have been upheld if the indictment had alleged such offense. Thus, the *Adams* case is not authority for appellant here who is charged with both facilitation and sale.

Appellant states (App. Br. p. 13) that "there is admittedly a conflict over the status of the appellant." We do not concede this conclusion since the facts here are only consistent with the jury's finding of appellant's position as a seller.

Appellant's attempt to place himself in the position of agent for Velasquez by relying on such factors as the failure of appellant to have the narcotics in his immediate possession, the delay of arrest of appellant for the purpose of trying to identify his supplier, if any, the fact that Velasquez did not know of a particular supplier for appellant, etc., is a naive, if unconvincing approach. It ignores completely the exigencies of this illicit traffic and the necessities in the Government's attempt to eliminate this evil.

The argument of appellant beginning at page 14, line 22, and continuing to page 16, line 10, of his Opening Brief, in which he relies on *United States v. Moses,* 220 F. 2d 166 (3 Cir., 1955), is extremely confusing. Close reading of that case indicates that the defendant was indicted as a *seller* of heroin while the facts showed that she *acted for the buyers,* a separate crime under the statute.

At page 168 of that opinion the following language appears:

> "There is no evidence that appellant's relationship to Cooper's illicit business was other than that of a customer. On the day in question she merely introduced the prospective buyers to Cooper and vouched for them, all at the buyers' request, with the result that the principals accomplished a sale some hours later. On these facts the district court, sitting without a jury, found the defendant guilty as charged.
>
> "* * *
>
> "The government has chosen to indict Marie Moses for her connection with the crime of selling rather than for any connection with buying. The conviction must stand, if at all, on her relation to the seller and his illicit enterprise. Any relation to the buyer actually militates against conviction of the charged offense of criminal complicity in selling.
>
> "The undisputed facts show the appellant acting solely at the behest of the prospective buyers and in their interest. At the buyers' request she did two things to facilitate their purchase. She introduced them to the seller and she vouched for their *bona fides*, if purchasers of contraband drugs can be so characterized. That is all that was proved. There was nothing to show that she was associated in any way with the enterprise of the seller or that she had any personal or financial interest in bringing trade to him. Although appellant's conduct was prefatory to the sale, it was not collaborative with the seller. For this reason the conviction cannot be sustained."

Appellant here fails to distinguish between aiding and abetting a *buyer* as occurred in the *Moses* case, and

facilitating a *sale* as was charged and proved in the instant case.

Finally, appellant is not in a position to complain of the court's refusal to give his instruction. It is obvious from a reading of the transcript that this was his basic defense from the very beginning of the trial, yet the instruction was not submitted in time as required by Local Rule 14(a) although it was prepared before trial [R. T. 200, line 19].

B. The Statutory Presumption Is Valid and Was Properly Presented With the Other Facts to the Jury for Its Ultimate Determination.

The statutory presumption that heroin was illegally imported and that defendant knew this fact has been sustained many times.

Hooper v. United States, 16 F. 2d 868, 869 (C. C. A. 9, 1926);

Stopelli v. United States, 183 F. 2d 391 (C. C. A. 9, 1950), cert. den. 340 U. S. 864;

United States v. Moe Liss, 105 F. 2d 144, 146 (C. C. A. 2, 1939);

United States v. Feinberg, 123 F. 2d 425 (C. C. A. 7, 1941), cert. den. 315 U. S. 801;

Howard v. United States, 75 F. 2d 562 (C. C. A. 7, 1935);

Frank v. United States, 37 F. 2d 77, 79, 80 (C. C. A. 8, 1929);

21 U. S. C. §174.

This Court has recently considered the matter once again, and in light of the *Tot* case (*Tot v. United States,* 319 U. S. 463) cited by appellant (App. Br. p. 17), in *Caudillo v. United States,* 253 F. 2d 513 (9 Cir., 1958). In the *Caudillo* case the Court once again upheld the constitutionality of the presumption, notwithstanding an attack which is similar to that advanced here by appellant, *i.e.,* that there is no rational connection between the facts proved and the ultimate fact presumed, and that the statute casts an unfair and practically impossible burden on the defendant. This Honorable Court pointed out in *Caudillo* that the *Tot* case provided no precedent for a narcotics type case, which is factually very different from a case involving possession of a firearm. While the appellant contends that there is no rational basis for the application of the presumption, this Court has not agreed with him, nor has the Supreme Court of the United States.

Yee Hem v. United States, 268 U. S. 178.

The elements of the offense with which appellant was charged, the statutory presumption, and a statement of the manner in which such inference could be overcome were all discussed by the court in its charge to the jury [R. T. 212-214]. The jury made the ultimate determination as one of fact and contrary to appellant's contentions on each of the four counts with which he was charged.

Since appellant failed to dispel the inference by contrary evidence to the jury's satisfaction, as required by the statute, he is not now in a position to complain.

Appellant suggests under this heading that there was error in denying his motion for acquittal. This Court has many times held that a motion for judgment of acquittal, even though made at the end of the prosecu-

tion's evidence, must be renewed at the end of all the evidence or it is waived.

Mosca v. United States, 174 F. 2d 448, 450-451 (9 Cir., 1949);

Malatkofski v. United States, 179 F. 2d 905, 910 (1 Cir., 1950).

(As to the necessity of making a motion for acquittal at the close of all evidence.)

United States v. Powell, 155 F. 2d 184 (7 Cir., 1946);

Leeby v. United States, 192 F. 2d 331, 333 (8 Cir., 1951).

C. An Undercover Agent May Properly Afford One Engaged in the Narcotics Traffic (as Here) the Opportunity to Commit a Felony. The Defense of Entrapment Is Unavailable in Such Circumstance.

Appellant's final point hopefully suggests the defense of entrapment. He is hardly in a position to argue this point, having waived it in the trial court [R. T. 199]. There the court offered to instruct the jury on the law as to entrapment and the appellant rejected the court's instruction. Although he would not submit this question to the jury, he now has the temerity to suggest that this Court should upset the jury's determination on that ground. He states with some candor, at page 21 of his Opening Brief: "Admittedly, most of the presently existing opinions weigh heavily against the availability of the defense of entrapment in this case." It is obvious that appellant was hoping for a change in the law of entrapment in the *Sherman* and *Masciale* cases, which were

pending in the United States Supreme Court when his brief was written. Unfortunately for appellant the Supreme Court has now rendered its decision in both cases on May 19, 1958. At this writing they are reported only in 26 Law Week 4334 (*Sherman*) and 26 Law Week 4339 (*Masciale*), but the court did not make any change in the existing law. It affirmed the principles as set forth in *Sorrells v. United States,* 287 U. S. 435.

The *Sherman* case resulted in a reversal of the conviction on the ground of entrapment. However, therein the court stated:

> "In *Sorrells v. United States,* 287 U. S. 435, this Court firmly recognized the defense of entrapment in the federal courts. The intervening years have in no way detracted from the principles underlying that decision.
>
> "* * *
>
> "However, the fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law-enforcement officials. See 287 U. S., at 441, 451. To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."

In the instant case on the uncontradicted facts we obviously have only a trap for an unwary criminal.

In the *Sherman* case there are peculiar facts in which an addict (appellant there) was importuned by another addict to help obtain some narcotics while attempting to "kick" the habit. The latter wanted the narcotics to ease

the process since he was not responding to the treatment which both addicts were taking. There were repeated requests over a period of time made to the appellant for a "source." Finally, the appellant there succumbed and both addicts shared the narcotics obtained on several occasions. Then the other addict informed to the Bureau of Narcotics and several subsequent transactions were observed by agents, resulting in the conviction in that case. The issue of entrapment was presented to the jury. The Supreme Court held, under those circumstances, that there was entrapment as a matter of law, and the conviction was reversed. The facts in the instant situation are far removed. Basically, there was no importuning, and many other factual differences are likewise apparent.

A reading of the *Masciale* case, decided the same day, and in which the conviction was affirmed despite an entrapment defense, indicates that the law remains unchanged. Of particular significance is this statement of Chief Justice Warren who wrote the opinions in both the *Sherman* and *Masciale* cases:

> "It is noteworthy that nowhere in his testimony did petitioner state that during the conversation either Marshall or Kowell tried to persuade him to enter the narcotics traffic."

Also significant is the following:

> "While petitioner presented enough evidence for the jury to consider, they were entitled to disbelieve him in regard to Kowell and so find for the Government on the issue of guilt."

In the instant case appellant did not testify; he waived the entrapment instruction; yet he now presents this defense as a basis for reversal before this Honorable Court. Nothing more need be said in that regard.

V.
CONCLUSION.

(1) It is clear that the appellant held himself out to be a seller of narcotics in this case. He also facilitated the sale of narcotics on behalf of some unknown supplier. (2) No evidence was before the trier of fact negating the statutory presumption that appellant knew the narcotics were illegally imported. (3) Finally, the defense of entrapment was waived by the appellant when he stated to the court that he did not want the standard instruction on entrapment given to the jury. He is not now in a position to complain. Therefore, the Government respectfully requests that the judgment of conviction of the trial court be affirmed.

Respectfully submitted,

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